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Request and Agreement to Arbitrate (Nonmember)

- (1) The undersigned agrees and wants to submit to arbitration before a Hearing Panel of the New Castle County Board of REALTORS® with the understanding that the arbitration will be conducted pursuant to the *Code of Ethics and Arbitration Manual* of the Board (or, alternatively, “in accordance with the professional standards procedures set forth in the Board’s bylaws”). The undersigned acknowledges having had the opportunity to review the Board’s procedures or having been provided with a copy of the procedures.
- (2) I am informed that each person named below is a member in good standing of the Board (or Participant in its MLS), or was a member of said Board of REALTORS® at the time the dispute arose.
- (3) A dispute arising out of the real estate business as defined by Article 17 of the Code of Ethics exists between me and (list all persons and/or firms you wish to name as respondents to this arbitration. Naming a REALTOR® [principal] as respondent enables the complainant to know who will participate in the hearing from the respondent’s firm; naming a firm may increase the likelihood of collecting any resulting award.):*

Name	Address
Name	Address
Firm	Address

- (4) There is due, unpaid, and owing to me (or I retain) from the above-named persons the sum of \$_____. My claim is predicated upon the statement attached, marked Exhibit I and incorporated by reference into this application.

Parties are strongly encouraged to provide any and all documents and evidence they intend to introduce during the hearing to the other party(ies) and to the association prior to the day of the hearing. Providing documents and evidence in advance can expedite the hearing process and prevent costly, unnecessary continuances.

- (5) The undersigned confirms that execution of this Agreement is wholly voluntary and, pursuant to this Agreement, agrees and promises to abide absolutely by the award of the Hearing Panel. In the event of adverse decision, I agree to, within ten (10) days following transmittal of the award, either (1) pay the award to the party(ies) named in the award or (2) deposit the funds with the Professional Standards Administrator to be held in an escrow or trust account maintained for this purpose consistent with Section 53, The Award, *Code of Ethics and Arbitration Manual*.

- (6) I enclose my check in the sum of \$_____ for the arbitration filing fee deposit. **

- (7) I understand that I may be represented by legal counsel, and that I should give written notice no less than fifteen (15) days before the hearing of the name, address, and phone number of my attorney to all parties and the Board. Failure to provide this notice may result in a continuance of the hearing, if the Hearing Panel determines that the rights of the other party(ies) require representation.

Each party must provide a list of the names of witnesses he intends to call at the hearing to the Board and to all other parties not less than fifteen (15) days prior to the hearing. Each party shall arrange for his witnesses to be present at the time and place designated for the hearing. All parties appearing at the hearing may be called as witnesses without advance notice.

- (8) I declare that this application and the allegations contained herein are true and correct to the best of my knowledge and belief and this request for arbitration is filed within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later.

Date(s) alleged dispute took place: _____

*Complainants may name one or more REALTOR® principals or a firm comprised of REALTOR® principals as respondent(s). Or, complainants may name REALTOR® principals and firms as respondents.

**Not to exceed \$500.

(9) If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented in the request (i.e., mandatory or voluntary), the party has twenty (20) days from the date of the receipt of the Grievance Committee's decision to file a written appeal of the decision. Only those materials that the Grievance Committee had at the time of its determination may be considered with the appeal by the Board of Directors.

(10) Are the circumstances giving rise to this arbitration request the subject of civil litigation? _____ Yes _____ No

(11) Important note related to arbitration conducted pursuant to Standard of Practice 17-4 (1) or (2): Where arbitration is conducted between two (or more) cooperating brokers pursuant to Standard of Practice 17-4 (1) or (2), the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker, seller, or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent.

(12) Agreements to arbitrate are irrevocable except as otherwise provided under state law.

Complainant(s):

Name (Type/Print) Signature of complainant Date

Address

Telephone Email

Name (Type/Print) Signature of complainant Date

Address

Telephone Email

Process Overview

Pre-mediation Preparation

- Ten days prior to session, parties receive a letter explaining the mediation process and logistical issues.
- Parties agree to mediate.
- Mediator is selected/appointed by random rotation, mutual request, or objection to a proposed mediator.
- Arrangements are made via letter or telephone.
 - Pre-mediation concerns are addressed.
 - Date and time typically scheduled at the convenience of the parties after a request for arbitration or mediation is received or following the grievance committee's determination of arbitrability.
- Witnesses and/or attorneys may attend, but this is not necessary because the process is non adversarial; there are no "findings of facts."
- Information is exchanged.
 - Parties need not prepare exhibits or extensive documentation. If a document will clarify an issue it may be used, but parties are reminded that mediation is not a fact-finding conference.

Mediation Conference

1. Mediator's opening statement/questions

Explain process and rules/goals, including the mediator's and parties' roles, voluntariness, neutrality, and confidentiality.

2. Parties' initial statements/questions

- Understanding perspectives
- Venting

3. Identification of issues

4. Create agenda

5. Cross-talk

Parties respond to each other and explain/explore information, needs, ideas and feelings.

6. Caucus (private meeting)

Mediator may meet privately with the parties to clarify needs and explore options for resolution and proposals.

7. Building an agreement

With the mediator's assistance, parties explore and refine workable solutions.

8. Conclusion

Agreement is reached/signed before leaving mediation or all agree that no further progress can be made, in which case parties are free to pursue arbitration.

Code of Ethics

NATIONAL ASSOCIATION OF REALTORS®

Mediation

The Winning Solution
for Brokers

collaborative
resolution
decisions
brokers
mediation
voluntary
non-adversarial
quick
agreement
control
ethics
confidential
neutral
process
conference

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Item 166-291P
(01/17)



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Even REALTORS® who are committed to high standards of conduct occasionally have honest business disputes with other professionals, clients, or customers. There is an ongoing need for efficient and economical mechanisms to resolve such disputes. Arbitration is valuable, but mediation is simpler and easier.

What is Mediation?

“The act or process of mediating; intervention between conflicting parties to promote reconciliation, settlement, or compromise.”

–Webster’s Ninth New Collegiate Dictionary

- Arbitration and mediation are valuable in resolving business disputes.
- Both mediation and arbitration are private and neutral/with expertise.

But . . .

- Mediation is an attractive alternative to arbitration.

Why Use Mediation?

Mediation	Arbitration
Low or no cost	Moderate cost
Quick	More time consuming
Win/win outcome	Win/lose outcome
Collaborative	Adversarial
Maximum range of solutions	Result limited to monetary award
Improves relationships	May damage relationships
Parties control outcome	Arbitrators control outcome

Key Features

Voluntary*/Private Process

- Parties decide to enter the mediation process.
- Parties can leave the mediation process at any time.
- Parties have complete control over the outcome.

Neutral/Impartial Mediator

- Understands issues quickly because typically, the facilitator is familiar with real estate practices and customs.
- Mediates only matters in which he/she remains neutral and impartial.
- Discloses conflicts of interest (parties may agree to continue following disclosure or terminate session).
- Facilitates and assists with negotiations – controls the process, not the substance.
- Honors the concepts of self-determination, respect, and civility.
- Enhances the parties’ abilities to understand their own and each other’s needs.
- Helps parties understand the alternatives to settling.
- Should possess these qualities, according to William Simkin in *Settling Disputes*:
 - wisdom of Solomon
 - the hide of a rhinoceros
 - the patience of Job
 - abilities of a half-back
 - wit of the Irish

*Voluntary unless mandated by the association

Confidential Process

- Mediation is a confidential settlement process.
- Neither the mediator nor the parties disclose the communications or conduct of the mediation, unless all parties agree (with limited exceptions, such as risk of harm).
- Ethical violations discovered as a result of participation in the mediation are not reported.
- Settlements discussed in mediation are not admissible in arbitration.
- Generally a mediator is not a witness in arbitration or court.
- Information gathered and exchanged may be used in arbitration only to the extent that it was obtained independently from the mediation process.

Why Mediation Works

- Most disputes are successfully resolved
- High speed
- Low or no cost
- Flexible
- Maintains/improves relationships
- Improves poor communication/clarifies misunderstandings because parties come together and talk
- Discovers/addresses the true interests of parties
- Moves beyond different views of law/fact
- Allows creative solutions beyond win/lose
- Mediated resolution is just as binding and enforceable as an arbitration award

When It Will Not Work

- When a precedent is necessary
- When there is no relationship and it is cheaper to contest the claim
- When vindication/punishment remains the main objective
- When the “jackpot syndrome” is involved (maximize/minimize recovery)

“Mediation is user friendly. It takes a potential conflict, turns it around and saves relationships.” –Larry Apple

“Mediation is the ONLY win/win solution in dispute resolution.” –Mike Wasmann

“Mediation lets participants accept responsibility for the outcome of their disputes, as opposed to relinquishing that authority to a third party.” –C. Hilea Walker

“Mediation is the best alternative because you have more control over the results, a better chance to communicate your story, and it strengthens REALTOR® relationships through mutual gain and satisfaction.” –Patrick Reilly

Mediation can save time and money and can be quicker, easier, and more amicable for resolving business disputes than arbitration.

Part Ten — Arbitration of Disputes

Section 43. Arbitrable Issues and Appropriate Parties

As used in Article 17 of the Code of Ethics and in **Part Ten** of this Manual, the terms “dispute” and “arbitrable matter” are defined as those contractual issues and questions, and specific non-contractual issues and questions defined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions, that arise out of the business relationships between REALTORS® and between REALTORS® and their clients and customers, as specified in **Part Ten**, Section 44, Duty and Privilege to Arbitrate. (*Revised 11/96*)

A Member Board should determine through advice of legal counsel:

- (1) Whether state law permits an agreement to binding arbitration in advance of a dispute or only after the dispute occurs, or
- (2) If binding arbitration is not recognized and is thus unenforceable by state law. The Board’s arbitration procedures must conform to applicable state law.

In 2001, Article 17 was amended by the addition of the following paragraph:

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award.

This expansion in the scope of Article 17 does not diminish the personal responsibility of REALTORS® to participate in arbitration. While Article 17 obligates REALTORS® to “. . . cause their firms to arbitrate and be bound by any award . . .,” it does not confer REALTOR® membership status on real estate firms. Membership, and the duties membership imposes including adherence to the Code of Ethics, is still personal to every REALTOR®.

The change to Article 17 enhances the dispute resolution process by increasing the availability of arbitration—and the likelihood that awards will be enforceable and paid. In many instances, the disputes giving rise to arbitration under Article 17 relate to contracts between REALTORS®’ firms or between REALTORS® acting on behalf of their respective firms. Even where disputes are actually between firms, Article 17 has required that arbitration complainants and respondents be individual REALTORS® (principals), and that awards be rendered in favor of and against individual REALTORS® (principals). In some instances this requirement has resulted in unfair results or rendered the arbitration process impotent because awards were uncollectible. Examples include REALTOR® (principal) respondents leaving the association’s jurisdiction, leaving the real estate business, relinquishing their status as a principal in the firm, or being insolvent or “judgment-proof.”

The expansion of Article 17 does not require substantive changes to the way associations of REALTORS® conduct arbitration. It does,

however, give both arbitration complainants and respondents greater latitude in determining who the parties are and how any resulting award will be made.

For example, a REALTOR® seeking to invoke arbitration could name a REALTOR® (principal) in another firm as the sole respondent; could name multiple REALTORS® (principals) in the other firm as respondents; could name a firm (comprised of REALTOR® principals) as the respondent; or could name both individual REALTORS® (principals) and their firm as respondents. In this way, the likelihood of the arbitration process being thwarted because a named respondent is no longer subject to an association’s jurisdiction before, during or after the arbitration process, or an award being uncollectible, is greatly reduced.

Similarly, individual REALTOR® respondents who want either additional REALTOR® principals or their firms (or both) to be parties to the dispute can file an arbitration request against the original complainants with additional REALTORS® (principals) or the firm (or both) named as complainants. In such cases both claims would be consolidated by the Grievance Committee and all claims would be resolved in a single hearing.

In 2012, Article 17 was further amended to provide Boards with discretionary authority to require REALTORS® (principals) and their firms to mediate otherwise arbitrable disputes and be bound by any resulting agreement. Requiring REALTORS® to mediate otherwise arbitrable disputes requires establishment of an affirmative obligation in the Board’s governing documents. Enabling language can be found at www.nar.realtor (see Model Bylaws). (*Adopted 11/11*)

Common questions include:

- (1) If only an individual REALTOR® (principal) is named as the respondent in an arbitration request, can a Hearing Panel make an award against the respondent’s firm?

No. Awards can only be made against named parties in the arbitration request and agreement.

- (2) If only an individual REALTOR® (principal) is named as the complainant in an arbitration request, can a Hearing Panel make an award in favor of the complainant’s firm?

No. Awards can only be made in favor of parties named in the arbitration request and agreement.

- (3) If an award is made against an individual REALTOR® (principal), is it enforceable against the respondent’s firm?

Awards are generally enforceable against parties named in the award.

- (4) Can I name both a REALTOR® (principal) and his firm as respondents in an arbitration request?

Yes.

- (5) What is the advantage to naming both a REALTOR® (principal) and his firm as respondents in an arbitration request?

Naming a REALTOR® (principal) as respondent lets the complainant know who will appear at the hearing, and naming the firm as respondent increases the chances of collecting any resulting award.

- (6) If a REALTOR®'s firm is named as the respondent in an arbitration request and refuses to arbitrate, who can be named as respondent in a complaint alleging that Article 17 has been violated?

Any REALTOR® (principal) who holds membership locally or who enjoys MLS participatory rights through the association can be named as respondent.

- (7) If only a REALTOR®'s firm is named as respondent in an arbitration request, who is served with notices?

Any REALTOR® (principal) in the firm may be served with notices.

(Revised 11/11)

Section 44. Duty and Privilege to Arbitrate

- (a) By becoming and remaining a member and by signing or having signed the agreement to abide by the bylaws of the Board, every member, where consistent with applicable law, binds himself or herself and agrees to submit to arbitration (and to mediation if required) by the Board's facilities all disputes as defined by Article 17 of the Code of Ethics and, as set forth in the provisions of this Manual, all disputes with any other member, as defined, under the following conditions. In addition, REALTOR® principals who participate in a Board's MLS where they do not hold Board membership, or nonmember brokers and nonmember licensed or certified appraisers who participate in the Board's MLS, having signed the agreement to abide by the Board's Multiple Listing Service rules and regulations binds himself or herself and agrees to submit to arbitration by the Board's facilities. The duty to submit to arbitration continues in effect even after membership lapses or is terminated, provided that the dispute arose while the respondent was a REALTOR® or an MLS Participant. *(Amended 11/11)*

Mandatory types of arbitration

- (1) Every REALTOR® of the Board who is a REALTOR® principal, every REALTOR® principal who participates in a Board's MLS where they do not hold Board membership and every nonmember broker or licensed or certified appraiser who is a Participant in the Board's MLS shall have the right to invoke the Board's arbitration facilities in any dispute arising out of the real estate business with a REALTOR® principal in another real estate firm or with that firm (or both), or nonmember broker/appraiser or their firm (or both) who is a Participant in the Board's MLS. *(Amended 5/01)*

- (2) A REALTOR® other than a principal or a REALTOR-ASSOCIATE® shall have the right to invoke the arbitration facilities of the Board in a business dispute with a REALTOR® or REALTOR-ASSOCIATE® in another firm or with their firm (or both), whether in the same or a different Board, provided the REALTOR® principal with whom he is associated joins in the arbitration request, and requests the arbitration with the REALTOR® principal of the other firm or with their firm (or both). Arbitration in such cases shall be between the REALTOR® principals or their firms (or both). REALTOR® nonprincipals and REALTOR-ASSOCIATE®s who invoke arbitration in this manner, or who are affiliated with a respondent and have a vested financial interest in the outcome, have the right to be present throughout the proceedings and to participate but are not considered to be parties. *(Amended 5/01)*

- (3) A client of a REALTOR® principal may invoke the arbitration facilities of the Board in a business dispute with a REALTOR® principal or the REALTOR®'s firm (or both) arising out of an agency relationship, provided the client agrees to be bound by the arbitration. In the event of such request and agreement the Board will arbitrate the dispute subject to the provisions of **Part Ten**, Section 45. A REALTOR® principal may also invoke arbitration against his client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision. *(Amended 5/01)*

Voluntary types of arbitration

- (4) REALTORS® and REALTOR-ASSOCIATE®s who are or were affiliated with the same firm shall have the same right to invoke the arbitration facilities of the Board, provided each party voluntarily agrees to the arbitration in writing and the Board finds the matter properly subject to arbitration in accordance with the provisions of **Part Ten**, Section 45 of this Manual. This privilege as stated applies to disputes arising when the parties are or were affiliated with the same firm, irrespective of the time request is made for such arbitration. *(Amended 11/95)*
- (5) A REALTOR® principal may invoke the arbitration facilities of his Board with a nonmember broker, provided each party agrees in writing to the arbitration and provided the Board finds the matter properly subject to arbitration in accordance with the provisions of **Part Ten**, Section 45 of this Manual. However, it shall be optional with the member as to whether he will submit to a claim to arbitration with a nonmember broker who is not an MLS Participant. A nonmember broker who is not an MLS Participant or nonmember salesperson may invoke the arbitration facilities of the Board of REALTORS® in cases where they believe they have an arbitrable dispute with a REALTOR®. Under these circumstances, REALTORS® are not required to agree to or participate in arbitration. *(Amended 11/12)*

- (6) Business disputes between a REALTOR® principal and a customer of the REALTOR® principal may be arbitrated by the Board if a written contractual relationship has been created by a REALTOR® principal between a customer and a client and provided all parties to the dispute (i.e., the customer and the REALTOR®) agree in writing to arbitrate the dispute. *(Amended 11/95)*
- (b) Where mandatory arbitration (and mediation if required by a Board) is consistent with applicable state law, the Code of Ethics, Article 17, requires only that disputes arising out of the real estate business between REALTORS® “. . . associated with different firms . . .” be arbitrated (or mediated if required by a Board). The various provisions of this Section represent the interpretations of the Professional Standards Committee with approval of the Board of Directors of the National Association as to appropriate policy of a Member Board in the matter of providing arbitration and mediation facilities by the Board. Thus, Member Boards must provide arbitration and mediation facilities for Board Members in the types of arbitration described in the preceding paragraphs (1), (2), and (3) and a Board may require REALTORS® (principals) to mediate otherwise arbitrable matters. Member Boards may provide arbitration and mediation facilities for the additional types of disputes described in the preceding paragraphs (4), (5), and (6). However, Member Boards shall not establish any mandatory requirement of its Board Members to arbitrate and/or mediate in the circumstances described in paragraphs (4), (5), and (6). No arbitration shall be initiated by the Board and no arbitration shall be undertaken by the Board unless it determines the dispute is properly arbitrable in accordance with the provisions of **Part Ten**, Section 45 of this Manual. *(Revised 11/11)*

Section 45. Board’s Right to Decline Arbitration

- (a) If either the Grievance Committee or the arbitration panel selected in the manner hereinafter provided determine that because of the amount involved or the legal complexity of the dispute the dispute should not be arbitrated, the arbitration shall automatically terminate unless either of the parties to the dispute appeals the decision to terminate the proceedings to the Board of Directors in writing within twenty (20) days of the date of notice that the Grievance Committee or the arbitration panel declined to continue the proceeding using Form #A-20, Appeal of Grievance Committee (or Hearing Panel) Dismissal or Appeal of Classification of Arbitration Request. The request for arbitration and any attachments cannot be revised, modified, or supplemented. The party appealing the dismissal may, however, explain in writing why they disagree with the Grievance Committee’s conclusion that the request for arbitration should be dismissed. The Hearing Panel can also dismiss the arbitration request if the Hearing Panel concludes the matter is not arbitrable. The written appeal
- and those materials and information which were available to the Grievance Committee or the arbitration Hearing Panel when the decision to discontinue arbitration was made will be presented to the Directors and considered with the appeal at the Directors’ next regularly scheduled meeting or a special meeting designated for that purpose, but no later than ten (10) days after the date of receipt of the appeal. The Directors’ decision shall be transmitted to the parties within five (5) days from the date of the decision. The complainant and respondent do not have the right to appear at the hearing before the Directors. In the event of such an appeal, the Grievance Committee or the arbitration panel shall report its conclusions in writing to the Directors and, if the Directors concur, the arbitration shall terminate and the parties shall be relieved of their obligation to arbitrate. In this event, or in the case of no appeal, any deposits made by the parties shall be returned to them. However, if the Board of Directors decides that the arbitration should proceed, the matter shall be remanded to the Grievance Committee or the arbitration panel for further proceedings. *(Revised 5/15)*
- (b) The President may appoint a panel of Directors, acting on behalf of the Board of Directors, to hear the appeal. Any appeal panel so appointed must be composed of at least five (5) Directors or a quorum of the Board of Directors, whichever is less. (Alternatively, the appeal may be heard by the Board’s Executive Committee.) The decision of the appeal panel (or Executive Committee) is final and not subject to further review by the Board of Directors. *(Revised 11/91)*
- (c) If an otherwise arbitrable matter is the subject of civil litigation, arbitration shall not take place unless the litigation is withdrawn or referred to the Board of Directors by the court for arbitration in accordance with Article 17. In instances where the arbitration is mandatory (as defined in **Part Ten**, Section 44 of this Manual), the failure to arbitrate may result in a charge alleging violation of Article 17.
- (d) If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented by the request (“mandatory” or “voluntary” arbitration situation), the party has twenty (20) days from the transmittal of the Grievance Committee’s decision to file a written appeal of the Grievance Committee’s determination using Form #A-20, Appeal of Grievance Committee (or Hearing Panel) Dismissal or Appeal of Classification of Arbitration Request. The materials and information which were available to the Grievance Committee when the Committee made its determination will be presented to the Directors and considered with the appeal, together with any party’s rationale challenging the Grievance Committee’s classification of the request. Appeals of classifications shall be heard at the next regularly scheduled Directors’ meeting or a special meeting designated for that purpose, but no later than ten (10) days after receipt of the appeal. The Directors’ decision shall be

transmitted to the parties within (5) days from the date of the decision. The complainant and respondent do not have the right to appear at the hearing before the Directors. In the event of such an appeal, the Grievance Committee must report its written conclusions to the Board of Directors. If the Directors determine that the arbitration request was incorrectly classified, they shall reclassify the request as either “mandatory” or “voluntary” arbitration and refer it to the Professional Standards Administrator for appropriate processing. *(Revised 05/15)*

Section 46. Duty to Arbitrate Before State Association

By becoming and/or remaining members of this Board, all members bind themselves and agree to submit to arbitration by the arbitration facilities of the _____ (state) Association of REALTORS® any dispute with a member of any other local Board or _____ (state) Association of REALTORS®, provided:

(1) The dispute is a dispute as defined and for which arbitration is required by Article 17 of the Code of Ethics, and

(2) The _____ (state) Association of REALTORS® has established facilities for such arbitration.*

Disputes as defined in Article 17 of the Code of Ethics requiring arbitration between members having no commonality of Board membership or MLS participation may be submitted and conducted under the procedure established in **Part Eleven** of this Manual, subject to such modification as may be required by applicable state law. Whether arbitration is conducted by the state association or by an interboard arbitration panel pursuant to **Part Eleven**, the costs charged to parties, including filing fees, may not exceed \$500. Where arbitration is conducted by the state association, any costs incurred that exceed the parties’ filing fees may be recouped from the parties’ local association(s). *(Revised 5/06)*

The method set forth in **Part Eleven** may also be utilized for the conduct of arbitration between Board Members of different Boards of different states, subject to the parties’ voluntary agreement in advance to accept the place, date, and time established by the arbitration panel thus chosen for a hearing, and to pay all costs of such arbitration as may be directed by the panel, and further subject to applicable state law of the respective states permitting such binding arbitration.

Section 47. Manner of Invoking Arbitration

(a) Any person authorized by the provisions of **Part Ten**, Section 44 of this Manual may request arbitration by the Board. A request for arbitration shall be in writing (Form

*The State Association as a Member Board of the National Association has the obligation to establish arbitration procedures and facilities consistent with applicable state law, as required by the Constitution, National Association, Article IV, and by Article 17, Code of Ethics of the National Association, for individual members of the State Association.

#A-1 or #A-2, Request and Agreement to Arbitrate, **Part Thirteen**, or any other appropriate form permitted by law), must be signed by the complainant, must indicate the nature of the dispute and the amount in dispute, and must be accompanied by the required deposit of \$_____.** Requests for arbitration must be filed within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later. Boards may provide mediation even if arbitration has not been requested provided the mediation is requested within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later. *(Revised 11/00)*

Suspension of filing deadlines: If the Board’s informal dispute resolution processes (e.g., ombudsmen, mediation, etc.) are invoked or initiated by a complainant (or potential complainant) with respect to an otherwise potentially arbitrable matter that becomes the subject of a subsequent arbitration request, the one hundred eighty (180) day filing deadline shall be suspended beginning with the date of the complainant’s (or potential complainant’s) request for informal dispute resolution service or assistance and shall resume when the informal dispute resolution procedures are concluded or terminated. Questions about when informal dispute resolution began or ended will be determined by the Board President or the President’s designee. *(Adopted 11/00)*

(b) The Professional Standards Administrator shall promptly refer the request for arbitration to the Chairperson of the Grievance Committee for determination by the Committee within _____ days as to whether the matter is subject to arbitration. *(Revised 11/98)*

The function of the Grievance Committee is to make only such preliminary review and evaluation of the request for arbitration as is required to determine (1) whether the matter is properly arbitrable; (2) whether arbitration is mandatory or voluntary based upon the requirements of **Part Ten**, Section 44 of this Manual; and (3) whether the proper parties are named in the request for arbitration. The Grievance Committee does not hold hearings, does not determine entitlement to awards, and does not dismiss arbitration requests because of a lack of evidence. A complainant is not required to prove their case upon submission of their arbitration request. *(Revised 11/15)*

The Grievance Committee may request the party(ies) named as respondent(s) in the request for arbitration to provide the

**This fee should not be so high as to deter parties from arbitration. This amount shall not exceed \$500. Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. *(Revised 11/96)*

Grievance Committee with a written response to the request for arbitration within _____ days only if the committee is in need of additional information pertaining to the questions in Section 42, Grievance Committee's Review and Analysis of a Request for Arbitration, and the complainant cannot provide such information. (See Form #A-5, Grievance Committee Request for Information [Arbitration Request] and Form #A-6, Response to Grievance Committee Request for Information, **Part Thirteen** of this Manual.) If no response is filed within fifteen (15) days from transmittal of the request for the response, the Grievance Committee shall make its determination as to whether an arbitration hearing should be scheduled based upon the information set forth in the request for arbitration. (Revised 11/15)

- (c) If the Grievance Committee finds the matter properly subject to arbitration, the Chairperson shall refer it back to the Professional Standards Administrator with instructions to arrange a hearing, notifying the parties of the Grievance Committee's decision, informing the parties as to whether the arbitration is mandatory or voluntary (and, if voluntary, of the date certain by which the respondent is requested to inform the Board of his decision) and informing the parties of their ability to challenge the classification (see Section 45[d], Board's Right to Decline Arbitration). The Professional Standards Administrator or Chairperson shall select a hearing date which will be transmitted to the parties within five (5) days of transmittal of the Grievance Committee's decision. The Professional Standards Administrator shall also notify the respondent within five (5) days of receipt of the Grievance Committee's instructions by transmitting a copy of the request for arbitration, the Notice to Respondent (Arbitration) (Form #A-3), and two (2) forms for response (Form #A-4, Response and Agreement to Arbitrate, **Part Thirteen**), with directions to complete and return the written response and deposit amount of \$_____ * within fifteen (15) days from the date of transmittal of the request for response to the respondent. The Professional Standards Administrator shall within five (5) days of transmittal of the Grievance Committee's decision transmit to each of the parties a list of names of members of the Professional Standards Committee (see **Part Seven**, Section 27, (a) through (f), Qualification for Tribunal; **Part Thirteen**, Form #A-7, Notice of Right to Challenge Tribunal Members; and Form #A-8, Challenge to Qualifications by Parties to Panel Members). The respondent's response and affirmative claim shall be transmitted to the complainant not later than five (5) days after receipt. Within five (5) days from the date the challenge forms are due (forms due within ten [10] days from the date the list of names was transmitted), the Professional Standards Committee Chairperson shall appoint from the names not successfully challenged by either party three (3) or more

arbitrators who will hear the dispute. The Chairperson shall also select one of the panel members to serve as Chairperson of the Hearing Panel. Any Hearing Panel must have an odd number of members. At least two (2) shall be REALTORS[®], and in the event a REALTOR-ASSOCIATE[®] or REALTOR[®] other than a principal has invoked the arbitration through the REALTOR[®] principal, or is affiliated with the respondent, and has a vested interest in the outcome of the proceeding, one (1) of the arbitrators must be a REALTOR-ASSOCIATE[®] or REALTOR[®] other than a principal. It shall be a membership duty of anyone so appointed to serve as an arbitrator unless disqualified. The Professional Standards Committee Chairperson shall select the Chairperson of the Hearing Panel, who shall possess the powers of the neutral arbitrator within the meaning of the _____ arbitration statutes.** A party will be deemed to have waived all objections to any person whose name he does not challenge. If challenge to members of the Professional Standards Committee results in an insufficient number of members to constitute a panel, the President may appoint other qualified Board Members to serve as panel members. No arbitration may proceed without three (3) or more arbitrators not disqualified pursuant to **Part Seven**, Section 27, Qualification for Tribunal. (Revised 05/15)

When Grievance Committees refer ethics complaints and arbitration requests for hearing, hearing panel chairs can determine if questions about

- (1) whether ethics complaints and arbitration requests are timely filed,
- (2) whether arbitrable issues exist,
- (3) whether arbitration requests are too legally complex to be fairly arbitrated, and
- (4) other administrative issues

will be addressed through a pre-hearing meeting of the hearing panel or at the outset of the hearing prior to testimony relating to the ethics complaint or arbitration request commencing. If these matters rise during a hearing, the hearing panel will address them at that time.

Dismissals of ethics complaints and arbitration requests by hearing panels can be appealed to the Board of Directors on the same bases as dismissals by the Grievance Committee.

Where such issues are considered at a pre-hearing meeting of the hearing panel, the chair will determine whether the parties may be present, and the extent to which their participation will be permitted. (Revised 05/14)

If the Grievance Committee dismisses the request as being unworthy of further consideration, the decision may be appealed to the Board of Directors within twenty (20) days from transmittal of the Grievance Committee's decision using

**As an alternative, the Board may, as a matter of Board procedure, elect to have the Board President appoint the Chairperson of each Hearing Panel.

*This fee should not be so high as to deter parties from arbitration. This amount shall not exceed \$500. Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR[®] requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/96)

Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form.* Only those materials which were presented to the Grievance Committee when the committee made its decision will be presented to the Board of Directors and considered with the appeal, and the complainant and respondent do not have the right to appear at the hearing before the Directors. The appeal shall be heard at the next regularly scheduled meeting or a special meeting designated for that purpose, but no later than ten (10) days after the date of receipt of the appeal. The Directors' decision shall be transmitted to the parties within five (5) days of the date of the decision. In the case of a dismissed arbitration request, the deposit shall be returned to the complainant. If the Directors determine that the arbitration request was improperly dismissed they shall refer it to the Professional Standards Committee for hearing. If the Directors determine that the request was improperly classified, they shall reclassify it appropriately. Upon determination of the Directors that the arbitration request should be referred for hearing, the Professional Standards Administrator shall at that time provide a copy of the response to the complainant if one had been submitted for review by the Grievance Committee. In any event, the Directors' decision shall be transmitted to the parties within five (5) days of the date of the decision. (Revised 05/15)

- (d) Boards are required to offer mediation as a preliminary, voluntary alternative to arbitration. Where mediation is offered prior to review of an arbitration request by the Grievance Committee and one or more of the parties declines or the mediation attempt is unsuccessful, the parties will not again be offered mediation. If a party requests a second opportunity to mediate, a second mediation can be scheduled at the discretion of the Association. (See Appendix V to **Part Ten**, Mediation as a Service of Member Boards.) (Revised 11/03)
- (e) Dismissal of an arbitration request by a Board of REALTORS® does not prohibit REALTORS® from exercising other remedies, including litigation, that may be available to them. (Adopted 5/99)

Section 48. Submission to Arbitration

- (a) Submission of a dispute to arbitration by the Board shall consist of signing and delivering to the Professional Standards Administrator either a request or response form provided by the Board (Form #A-1 or #A-2, Request and Agreement to Arbitrate, or Form #A-4, Response and Agreement to Arbitrate) or any similar writing permitted by law and making the appropriate deposit of \$_____ (not

to exceed \$500).** Agreements to arbitrate are irrevocable except as otherwise provided under state law. (Revised 5/01)

NOTE: The circumstances under which Member Boards may conduct arbitration will vary based upon state arbitration other statutes and case law. Member Boards should consult with Board or State Association legal counsel and select the appropriate procedure from those listed below as Options #1, #2, and #3. No arbitration hearing may be held in the absence of the complainant, and no award may be rendered without a hearing on the merits. (Revised 11/91)

In any instance where arbitration has been conducted and an award rendered under Option #2 or #3 of this Section; where the amount requested by the party initiating the arbitration has been awarded; and where the respondent has failed to make the specified deposit, it shall be the responsibility of the respondent to pay an amount equal to the deposit to the Board within ten (10) days of receipt of notice from the Board requesting payment. Where the respondent has not made the deposit and a partial award is made, the respondent shall pay to the Board an amount to be determined by the Hearing Panel that will not exceed the deposit originally made by the complainant. Failure to make such payment on a timely basis, upon receipt of a request from the Board, shall be treated in the manner specified in the Board's bylaws for failure to satisfy financial obligations to the Board. (Adopted 5/88)

Option #1

- (b) Arbitration shall not proceed unless the signed Response and Agreement Form (**Part Thirteen**, Form #A-4) and deposit amount have been received from the respondent and the respondent appears and takes part in the hearing (Revised 11/05).

Option #2

- (b) In the event the respondent fails to sign and return the Response and Agreement Form (**Part Thirteen**, Form #A-4), or fails or refuses to make the required deposit, arbitration may proceed, and a valid award may be rendered if the respondent appears and takes part in the hearing.

NOTE: This option may be adopted only where state law permits arbitration to proceed in the absence of signed arbitration agreements. The advice of legal counsel should be obtained to determine whether Board membership creates an enforceable obligation to arbitrate under the circumstances established in **Part Ten**, Section 44 of this Manual.

**Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/93)

*Any member of a Grievance Committee who is a member of the Board of Directors shall not sit as a Director during any appeal from a decision of the Grievance Committee, nor shall such individual participate in any vote of the Directors with respect to such matters.

Option #3

- (b) In the event the respondent fails or refuses to sign the Response and Agreement Form (**Part Thirteen**, Form #A-4), fails or refuses to make the required deposit, or fails or refuses to take part in the arbitration hearing, the arbitration hearing may be scheduled and conducted in the absence of the respondent.

NOTE: Arbitration in the absence of a respondent may take place only where permitted by state statute or case law. In such instances, the Board should ensure that all preliminary procedural steps, including the provision of adequate prior notice, are complied with. In the event a respondent fails to appear, it is strongly recommended that an attempt be made to determine whether the failure to appear is because of the respondent's refusal to arbitrate or due to unforeseen circumstances. *(Revised 11/91)*

Where arbitration takes place in a respondent's absence, the respondent is still entitled to be represented by legal counsel. Counsel may make opening and closing statements; call witnesses; cross-examine witnesses called by other parties; and introduce affidavits, documents, and other admissible relevant evidence. Counsel may not testify to events and facts of which counsel has no firsthand knowledge. Hearing Panels should be instructed by the Chair that counsel's arguments do not constitute testimony. *(Adopted 11/98)*

Associations are encouraged, but not required, to refund part or all of the parties' deposits in cases where disputes are resolved through mediation. Associations are also encouraged to adopt and follow a consistent policy regarding the disposition of arbitration deposits. *(Adopted 5/10)*

Section 49. Initial Action by Directors

If the complainant alleges that a member has improperly refused to submit a dispute to arbitration (or mediation if required by the Board), the complaint shall not be referred to the Grievance Committee or a Hearing Panel, but shall be brought before the Board of Directors at the next regular meeting or at a special meeting called by the President for that purpose. The procedures for notices, time of notice, and hearing prescribed for matters before a Hearing Panel shall apply. The sole question of fact for the Directors to decide will be whether the respondent has failed to submit an arbitrable matter to arbitration or mediation in violation of Article 17. *(Revised 11/11)*

There can be no charge that there has been a refusal to arbitrate (or mediate if required by the Board) until the Grievance Committee determines the matter is arbitrable and of a mandatory nature and the respondent fails to submit to arbitration or mediation before the Board. *(Revised 11/11)*

 Upon determination that the member has refused to arbitrate or mediate a properly arbitrable matter, the Board of Directors may direct the implementation of appropriate sanction and should, if it has reason to believe that the imposition of

sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action. *(Revised 11/11)*

On the other hand, if the complaint against the member is that, having properly submitted a dispute to arbitration or mediation, the member has refused to abide by the award or the resulting agreement, such refusal should not be referred to the Grievance Committee as a violation of the Code of Ethics unless it reflects an established pattern or practice of noncompliance with the commitment to arbitrate or mediate. A refusal to abide by an award in arbitration or any resulting agreement in mediation should be enforced in the manner set forth in **Part Ten**, Section 56, Enforcement.* *(Revised 11/11)*

Section 50. Preliminary Judicial Determination Prior to Imposition of Discipline

If the Board of Directors has reason to believe that the imposition of a proposed sanction will become the basis of litigation and a claim for damages, it may specify that the discipline shall become effective upon entry of the final judgment of a court of competent jurisdiction in a suit by the Board for declaratory relief declaring that the discipline proposed violates no rights of the member.** 

Section 51. Arbitration Hearing

- (a) Not later than five (5) days after receipt of the response and affirmative claim, the Professional Standards Administrator shall transmit to the complainant a copy of the response and respondent's affirmative claim, if any. *(Revised 11/15)*

In the case of an arbitration request involving issues related to areas of the real estate business such as commercial, investment, industrial, etc., where there is an insufficient number of qualified practitioners on the Board's Professional Standards Committee to provide a representative peer panel, the Board President shall appoint other Board Members qualified in that field to serve as panel members. If the Board President is unable to identify a sufficient number of qualified members to serve on a panel, the President shall report that fact to the Directors at their next regularly scheduled meeting. If the Board of Directors concurs, the request shall be referred to the State Association pursuant to **Part Fourteen** of this Manual. If the State Association is unable to provide a representative peer panel, the parties shall be released from their obligation to arbitrate. *(Revised 11/98)*

- (b) The Professional Standards Administrator shall inform the parties of the date, time, and place of the hearing established by

*Refer to Appendix III to **Part Ten** for the rationale for use of judicial enforcement of arbitration awards when a Board Member refuses to pay an award in arbitration.

Refer to Rationale of Declaratory Relief Procedure provided in Appendix IV to **Part Four.

the arbitrators (or the Chairperson of the Professional Standards Committee) (Form #A-9, Official Notice of Hearing, **Part Thirteen**).* The arbitration request and response, if any, shall be provided to Hearing Panel members prior to the hearing. Such time period shall be _____ (as determined by the Board of Directors) and shall be adhered to for all hearings. Board's conducting arbitration must also provide all parties and panel members with the Arbitration Guidelines prior to commencement of any arbitration hearing (including the Arbitration Work Sheet). The parties shall be given at least twenty-one (21) days' prior notice of the hearing, but appearance at a hearing without objection by a party will constitute a waiver of any defective notice of the hearing. The arbitrators may recess the hearing from time to time as necessary. Parties' requests for continuances shall only be granted when all parties mutually agree to a subsequent specified date, or when the hearing panel chair determines that denying the request for continuance would deny the requestor a fair hearing. (Revised 11/14)

- (c) Upon notice by the Professional Standards Administrator, the parties to the dispute shall with diligence present to the arbitrators in writing such statements and proof which they deem necessary to support their claims. Proof may be submitted in the form of affidavits or otherwise. The Hearing Panel of arbitrators may require that statements be verified by affidavits or that accuracy or authenticity of any documents or other papers submitted be verified by affidavit. At the hearing, the arbitrators shall receive any further written statements, documents, or other papers, shall hear oral testimony and determine what personal appearances shall be made by the parties, and shall regulate the holding of hearings.** The Hearing Panel may receive and consider any evidence they deem material and proper, including evidence of accountants and other experts. Each party is responsible for the expenses of expert witnesses he calls. Parties to arbitration shall be entitled to have legal counsel present at any hearing. Each party is responsible for the expenses of his respective counsel.

Section 52. Settlement

The parties to an arbitration may settle the issue between them by agreement at any time. In such event, upon notification to the Professional Standards Administrator, the arbitration proceedings shall be terminated and the termination shall be recorded in the file.

A portion of each party's deposit may be retained by the Board to cover the costs incurred by the Board up to the point of settlement of the dispute.

Section 53. The Award

- (a) The award of the arbitrators (Form #A-12, Award of Arbitrators, **Part Thirteen**) shall be made the day of the hearing, or no later than forty eight (48) hours following the conclusion of

*Form #A-10, Outline of Procedure for Arbitration Hearing, **Part Thirteen**, should accompany the notice of the hearing or be otherwise provided to the parties prior to the hearing.

Such hearings should be conducted according to **Part Twelve, Conduct of an Arbitration Hearing.

the hearing. The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal. The award shall be transmitted to the parties within five (5) days after the award is reduced to writing. Any award rendered may not be greater than the amount in dispute, may not include punitive damages, may not include attorney's fees unless expressly provided for in the agreement giving rise to the dispute, and may not include interest unless called for in the arbitration agreement and permitted by state law. Notwithstanding the foregoing, a party to an arbitration proceeding may appeal to the Board of Directors only with respect to such alleged irregularities occurring in the conduct of the proceeding as may have deprived the party of fundamental "due process." (Revised 05/15)

- (b) If an award has been rendered, the non-prevailing party must, within ten (10) days following transmittal of the award, either (1) pay the award to the party(ies) named in the award or (2) deposit the funds with the Professional Standards Administrator to be held in an escrow or trust account maintained for this purpose. Failure to satisfy the award or to deposit the funds in the escrow or trust account within this time period may be considered a violation of a membership duty and may subject the member to disciplinary action at the discretion of the Board of Directors. (Revised 05/15)
- (c) After the award has been transmitted to each of the parties, they have twenty (20) days to request procedural review of the arbitration hearing procedure by the Board of Directors. The non-prevailing party shall also have the same twenty (20) days following transmittal of the award to notify the Professional Standards Administrator that a legal challenge to the validity of the award has been initiated. (Revised 05/15)

If no such procedural review is requested, the award becomes final and binding following the twenty (20) day period. However, if procedural review is requested, the award is not considered final and binding until after the Board of Directors has concluded that the hearing was conducted in a manner consistent with the Board's procedures and the parties had been afforded due process. (Revised 05/15)

- (d) If a request for procedural review of the arbitration procedure is received within twenty (20) days, the funds deposited shall be retained in the escrow or trust account until the review is completed. If the arbitration award is confirmed by the Board of Directors following the conduct of the limited procedural review, the nonprevailing party shall have an additional fifteen (15) days from the transmittal of the Directors' decision to institute an appropriate legal challenge to the validity of the arbitration award. In such case, the nonprevailing party shall also cause legal counsel to advise the Board in writing that a suit challenging the validity of the arbitration award has been filed during this additional fifteen (15) day period. After fifteen (15) days from the transmittal of the Directors' decision, if written notice of a suit challenging the validity of the arbitration award has not been received by the

Board, the funds shall be released from the escrow or trust account and paid to the prevailing party. If written notification is received during the fifteen (15) day period, the funds will be held in the escrow or trust account pending the determination of the matter by a court of competent jurisdiction. *(Revised 05/15)*

If the nonprevailing party does not request the Board to conduct a procedural review of the arbitration hearing process during the twenty (20) day period following transmittal of the award, then written notification that a legal challenge has been instituted must be received within the twenty (20) days following transmittal of the award. Failure to provide written notification that a suit challenging the validity of the award has been filed within twenty (20) days following transmittal of the award will result in the award being paid from the escrow or trust account to the prevailing party. *(Revised 05/15)*

- (e) Any failure to make the necessary deposits shall be referred to the Board of Directors for action at their next meeting or at a special meeting called for that purpose. The party failing to make the deposit on a timely basis shall be advised of the date, time, and place of the meeting and shall have an opportunity to explain why the required deposits were not made on a timely basis. The Board of Directors may, at its discretion, impose discipline or may give the party an additional period to make the required deposits. The Directors may also stipulate appropriate discipline to be automatically imposed if the party fails to make the deposit within the time established by the Directors. *(Revised 05/15)*
- (f) Any interest accrued on the escrowed funds shall become the property of the party to whom the funds are ultimately released. *(Revised 05/15)*

NOTE: Escrowing of arbitration awards to secure timely payment as addressed in Section 53 (b-c) is not required in states where escrowing awards by associations is prohibitively expensive, and where the state association recommends alternative aggressive and cost-effective enforcement procedures that maximize enforcement/payment under state law, and local associations adopt those procedures, provided that nothing in those procedures is prohibited by National Association policy. *(Adopted 05/15)*

Section 54. Costs of Arbitration

The deposits of the parties shall be used by the Professional Standards Administrator to cover the costs of arbitration as it may be required. Any portion not used specifically to cover the costs of the arbitration shall go into the general operating funds of the Board of REALTORS®.* When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. *(Revised 11/95)*

*In cases of arbitration not mandated by the Board, and in which the Board provides arbitration as a service to the parties voluntarily seeking arbitration, the Board may recover its legal fees as it deems appropriate.

NOTE: At the option of each Member Board procedures providing for alternative disposition of arbitration deposits may be adopted. These can include returning the deposit to any prevailing party or returning a portion of the deposit to each party should the award rendered be an amount other than that requested by any of the parties. In any instance where return of part or all of any party's deposit is involved, disposition of such deposits shall be determined by the arbitrators. *(Adopted 11/95)*

NOTE: Associations are strongly encouraged to refund all or part of parties' filing deposits where disputes are resolved through mediation. If an association elects to adopt this optional procedure, the following should be incorporated as part of the association's dispute resolution procedures:

"Where parties successfully mediate an otherwise arbitrable dispute, their arbitration filing fees will be refunded," or "Where parties successfully mediate an otherwise arbitrable dispute _____ % (or \$ _____) of their filing fee will be refunded." *(Adopted 5/10)*

If parties settle the dispute after the hearing begins but before the executive session begins, determine the disposition of the arbitration deposit. *(Adopted 11/16)*

Section 55. Request for Procedural Review by Directors

- (a) A written request for procedural review of the arbitration hearing procedures must be filed with the President within twenty (20) days after the award has been transmitted to the parties and be accompanied by a deposit in the sum of \$_____ (not to exceed \$500). The request for procedural review should cite the alleged procedural deficiencies or other irregularities the party believes constitute a deprivation of due process (e.g., fraud, coercion, bias, prejudice, evident partiality, etc.) on the part of Hearing Panel members or others acting on behalf of the Board. The request for procedural review shall be reviewed within ten (10) days of receipt of the request by the Board President or the President's designee only for the purpose of determining whether the request states any legitimate basis for consideration by the Board of Directors. If determined to be insufficient, it shall be returned to the requester accompanied by an explanation and a request for additional detail to be received by the Board within ten (10) days of notice. This initial administrative review is not a decision on the merits of the request for procedural review but is intended only to ensure compliance with the requirement that the request cite the alleged procedural deficiency or irregularity on which the request is based and which will be presented to the Board of Directors for its consideration. All requests for procedural review received by the Board must be considered by the Board of Directors, and only the bases raised in the written request for procedural review may be raised during the review before the Directors. *(Amended 11/15)*
- (b) When a request for procedural review (as originally filed if in proper form, or as originally filed if no amendment is

submitted, or as amended even if still deemed to be lacking) is received, the Professional Standards Administrator shall within one (1) day of receipt of the request or within one (1) day of receipt of additional detail, if provided or the date that the period to provide additional detail has elapsed, send a copy to the other party, notify all parties of the time and place of the review hearing by the Directors at least ten (10) days in advance (including challenge Forms #A-7 and #A-8, **Part Thirteen** of this Manual), and bring the matter before the Directors for review at their next regular meeting or at a special meeting called by the Professional Standards Administrator for that purpose, but not later than thirty (30) days after the date of receipt of the procedural review. The Professional Standards Administrator shall provide to the Directors, in advance, a copy of the request for procedural review or the amended request for procedural review, if any, and the President's correspondence, if any. The Directors shall be advised that the information provided is confidential and not to be discussed with others at any time. *(Revised 05/15)*

 (c) The request for procedural review may be heard by a panel of Directors appointed by the President for that purpose (or, alternatively, by the Board's Executive Committee). Five (5) Directors or a quorum of the Board of Directors, whichever is less, shall constitute such panel, which shall act on behalf of the Board of Directors. The decision of the panel (or Executive Committee) shall be final and binding and shall not be subject to further review by the Board of Directors. *(Revised 11/91)*

(d) At the procedural review hearing, the party filing the request will have an opportunity to explain the bases on which the party is requesting that the award of the arbitrators be overturned. The Chairperson of the arbitration panel (or the Chairperson's designee) will have an opportunity to respond to the allegations. The other party shall have the opportunity to present to the Directors reasons why the arbitration Hearing Panel's award should not be overturned. *(Revised 5/09)*

(e) The Board of Directors shall not hear an appeal with respect to the merits of an arbitration award, and shall not, on appeal, review such evidence offered with respect to the merits of that award, except as such evidence may bear upon a claim of deprivation of due process. The Directors shall transmit their decision within five (5) days from the date of the procedural review hearing. This decision may be to adopt the award of the arbitrators or to overturn the award based on a substantial procedural error in the arbitration hearing process that resulted in a denial of due process or on a determination that the member was otherwise deprived of due process. *(Revised 05/15)*

(f) If the Directors determine that a substantial procedural error occurred or a member was otherwise deprived of due process, the Directors shall invalidate the original arbitration award and direct that the matter be referred to the Professional Standards Committee for a hearing on the

merits before a different Hearing Panel, or, alternatively, the Directors may release the parties from their obligation to arbitrate if the Directors conclude that the Board will be unable to impanel an impartial Hearing Panel.

(g) After all procedural remedies provided for in the Board's procedures have been exhausted, a member is not precluded from asserting any legal rights to which he is entitled. Assertion of such legal rights in the courts does not violate Article 17 of the Code of Ethics. The exercise of such legal rights by a member would result in judicial review similar to that set forth in **Part Ten**, Section 56 of this Manual. Section 56 recommends that, in instances where a member fails to comply with an award, the award recipient seek judicial enforcement, which results in judicial review, and, absent any showing of deprivation of due process, the judicial review will generally affirm the award rendered through the arbitration process and will enable the recipient to have it enforced. *(Revised 11/88)*

Section 56. Enforcement

The judgment of any competent court of record in _____  (state), state or federal, may be rendered upon the award. If a member fails to comply with an award or the terms of a mediated settlement agreement, the recipient to whom the award has been rendered by the arbitration panel or the beneficiary of a settlement agreement reached by the parties in mediation shall be advised by the Board to seek judicial enforcement and to request reimbursement of legal fees incurred in seeking enforcement. At the discretion of the Board of Directors, the Board may support the request for judicial enforcement in the court, and at its further discretion, the Board may reimburse the individual for costs incurred in seeking such judicial enforcement if the court does not grant reimbursement of legal costs to the plaintiff. *(Revised 11/14)*

Appendix II to Part Ten

Arbitration Guidelines

(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

A key element in the practice of real estate is the contract. Experienced practitioners quickly become conversant with the elements of contract formation. Inquiry, invitation, offer, counteroffer, contingency, waiver, acceptance, rejection, execution, breach, rescission, reformation, and other words of art become integral parts of the broker's vocabulary.

Given the significant degree to which Article 3's mandate for cooperation — coupled with everyday practicality, feasibility, and expediency — make cooperative transactions facts of life, it quickly becomes apparent that in virtually every real estate transaction there are actually several contracts which come into play. Setting aside ancillary but still important contracts for things such as mortgages, appraisals, inspections, title insurance, etc., in a typical residential transaction (and the same will be true in many commercial transactions as well) there are at least three (and often four) contracts involved, and each, while established independently of the others, soon appears to be inextricably intertwined with the others.

First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be subagents, buyer agents, or acting in some other capacity.

Second, there is the contract between the listing broker and cooperating brokers. While this may be created through an offer published through a multiple listing service or through some other method of formalized cooperative effort, it need not be. Unlike the bilateral listing contract (where generally the seller agrees to pay a commission in return for the listing broker's production of a ready, willing, and able purchaser), the contract between the listing broker and the cooperating broker is unilateral in nature. This simply means that the listing broker determines the terms and conditions of the offer to potential cooperating brokers (and this offer may vary as to different potential cooperating brokers or as to cooperating brokers in different categories). This type of contract differs from a bilateral contract also in that there is no contract formed between the listing broker and the potential cooperating brokers upon receipt of the listing broker's offer. The contract is formed only when accepted by the cooperating broker, and acceptance occurs only through performance as the procuring cause of the successful transaction. (*Revised 11/97*)

Third, there is the purchase contract — sometimes referred to as the purchase and sale agreement. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other than the seller or buyer is referenced in the purchase contract does not make him/her a

party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. Similar in many ways to the listing contract, this bilateral contract establishes the duties of the purchaser and the broker as well as the terms and conditions of the broker's compensation.

These contracts are similar in that they are created through offer and acceptance. They vary in that acceptance of a bilateral contract is through a reciprocal promise (e.g., the purchaser's promise to pay the agreed price in return for the seller's promise to convey good title), while acceptance of a unilateral contract is through performance (e.g., in producing or procuring a ready, willing, and able purchaser).

Each of these contracts is subject to similar hazards in formation and afterward. The maker's (offeror's) offer in any of these scenarios may be accepted or rejected. The intended recipient of the offer (or offeree) may counteroffer. There may be questions as to whether a contract was formed — e.g., was there an offer, was it accepted, was the acceptance on the terms and conditions specified by the maker of the offer — or was the "acceptance" actually a counteroffer (which, by definition, rejects the first offer). A contract, once formed, may be breached. These and other questions of contract formation arise on a daily basis. There are several methods by which contractual questions (or "issues" or "disputes") are resolved. These include civil lawsuits, arbitration, and mediation.

Another key contract is the one entered into when a real estate professional joins a local Board of REALTORS® and becomes a REALTOR®. In return for the many benefits of membership, a REALTOR® promises to abide by the duties of membership including strict adherence to the Code of Ethics. Among the Code's duties is the obligation to arbitrate, established in Article 17. Article 17 is interpreted through five Standards of Practice among which is Standard of Practice 17-4 which enumerates four situations under which REALTORS® agree to arbitrate specified non-contractual disputes. (*Adopted 11/96*)

Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS®. Disputes arising out of any of the five above-referenced contractual relationships may be arbitrated, and the rules and procedures of Boards and Associations of REALTORS® require that certain types of disputes must be arbitrated if either party so requests. (Information on "mandatory" and "voluntary" arbitration is found elsewhere in the *Code of Ethics and Arbitration Manual*.) (*Revised 11/96*)

While issues between REALTORS® and their clients — e.g., listing broker/seller (or landlord) or buyer broker/buyer (or tenant) — are subject to mandatory arbitration (subject to the client’s agreement to arbitrate), and issues between sellers and buyers may be arbitrated at their mutual agreement, in many cases such issues are resolved in the courts or in other alternative dispute resolution forums (which may also be administered by Boards or Associations of REALTORS®). The majority of arbitration hearings conducted by Boards and Associations involve questions of contracts between REALTORS®, most frequently between listing and cooperating brokers, or between two or more cooperating brokers. These generally involve questions of procuring cause, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute. While awards are generally for the full amount in question (which may be required by state law), in exceptional cases, awards may be split between the parties (again, except where prohibited by state law). Split awards are the exception rather than the rule and should be utilized only when Hearing Panels determine that the transaction would have resulted only through the combined efforts of both parties. It should also be considered that questions of representation and entitlement to compensation are separate issues. (*Revised 11/98*)

In the mid-1970s, the NATIONAL ASSOCIATION OF REALTORS® established the Arbitration Guidelines to assist Boards and Associations in reaching fair and equitable decisions in arbitration; to prevent the establishment of any one, single rule or standard by which arbitrable issues would be decided; and to ensure that arbitrable questions would be decided by knowledgeable panels taking into careful consideration all relevant facts and circumstances.

The Arbitration Guidelines have served the industry well for nearly two decades. But, as broker-to-broker cooperation has increasingly involved contracts between listing brokers and buyer brokers and between listing brokers and brokers acting in nonagency capacities, the time came to update the Guidelines so they remained relevant and useful. It is to this end that the following is intended.

Procuring Cause

As discussed earlier, one type of contract frequently entered into by REALTORS® is the listing contract between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in *Black’s Law Dictionary*, Fifth Edition, definition of procuring cause:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with “efficient cause.”

A broker will be regarded as the “procuring cause” of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in

their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner’s terms. Mohamed v. Robbins, 23 Ariz. App. 195, 531 p.2d 928, 930.

See also Producing cause; Proximate cause.

Disputes concerning the contracts between listing brokers and cooperating brokers, however, are addressed by the National Association’s Arbitration Guidelines promulgated pursuant to Article 17 of the Code of Ethics. While guidance can be taken from judicial determinations of disputes between sellers and listing brokers, procuring cause disputes between listing and cooperating brokers, or between two cooperating brokers, can be resolved based on similar though not identical principles. While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by Boards and Associations of REALTORS®, procuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction. Or, in other words, what “caused” the successful transaction to come about. “Successful transaction,” as used in these Arbitration Guidelines, is defined as “a sale that closes or a lease that is executed.” Many REALTORS®, Professional Standards Administrators, lawyers, and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no “typical” real estate transaction any more than there is “typical” real estate or a “typical” REALTOR®. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association’s Board of Directors, in 1973, adopted Official Interpretation 31 of Article I, Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR® in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership.

The explanation of Interpretation 31 goes on to provide, in part:

. . . [T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants make blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease). While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional,* the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. *(Revised 11/98)*

Factors for Consideration by Arbitration Hearing Panels

The following factors are recommended for consideration by Hearing Panels convened to arbitrate disputes between brokers, or between brokers and their clients or their customers. This list is not all-inclusive nor can it be. Not every factor will be applicable in every instance. The purpose is to guide panels as to facts, issues, and relevant questions that may aid them in reaching fair, equitable, and reasoned decisions.

*Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to **Part One**, G. Commission/Cooperative Compensation Offers, Section 1, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®, *Handbook on Multiple Listing Policy*. *(Adopted 11/98)*

Factor #1. No predetermined rule of entitlement

Every arbitration hearing is considered in light of all of the relevant facts and circumstances as presented by the parties and their witnesses. "Rules of thumb," prior decisions by other panels in other matters, and other predeterminants are to be disregarded.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. *(Adopted 4/95)*

Factor #2. Arbitrability and appropriate parties

While primarily the responsibility of the Grievance Committee, arbitration Hearing Panels may consider questions of whether an arbitrable issue actually exists and whether the parties named are appropriate to arbitration. A detailed discussion of these questions can be found in Appendix I to **Part Ten**, Arbitrable Issues.

Factor #3. Relevance and admissibility

Frequently, Hearing Panels are asked to rule on questions of admissibility and relevancy. While state law, if applicable, controls, the general rule is that anything the Hearing Panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.

Arbitration Hearing Panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the Hearing Panel looks with disfavor on the potential recipient's manner of doing business or even that the panel believes that unethical conduct may have occurred. To prevent any appearance of bias, arbitration Hearing Panels and procedural review panels shall make no referrals of ethical concerns to the Grievance Committee. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the Grievance Committee rests with the parties and others with firsthand knowledge. At the same time, evidence or testimony is not inadmissible simply because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to "punish" a perceived "wrongdoer", it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award. *(Amended 11/96)*

Factor #4. Communication and contact — abandonment and estrangement

Many arbitrable disputes will turn on the relationship (or lack thereof) between a broker (often a cooperating broker) and a prospective purchaser. Panels will consider whether, under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want

to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity, or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker and purchaser; the issue then becomes whether the broker's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker. (*Revised 11/99*)

Factor #5. Conformity with state law

The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in strict conformity with the law. In such matters, the advice of Board legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in Board-conducted arbitration is a preponderance of the evidence, and the initial burden of proof rests with the party requesting arbitration (see Professional Standards Policy Statement 26). This does not, however, preclude panel members from asking questions of the parties or witnesses to confirm their understanding of testimony presented or to ensure that panel members have a clear understanding of the events that led to the transaction and to the request for arbitration. Since each transaction is unique, it is impossible to develop a comprehensive list of all issues or questions that panel members may want to consider in a particular hearing. Panel members are advised to consider the following, which are representative of the issues and questions frequently involved in arbitration hearings.

Nature and status of the transaction

- (1) What was the nature of the transaction? Was there a residential or commercial sale/lease?
- (2) Is or was the matter the subject of litigation involving the same parties and issues as the arbitration?

Nature, status, and terms of the listing agreement

- (1) What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open, or some other form of agreement?
- (2) Was the listing agreement in writing? If not, is the listing agreement enforceable?
- (3) Was the listing agreement in effect at the time the sales contract was executed?

- (4) Was the property listed subject to a management agreement?
- (5) Were the broker's actions in accordance with the terms and conditions of the listing agreement?
 - (a) Were all conditions of the listing agreement met?
 - (b) Did the final terms of the sale meet those specified in the listing agreement?
 - (c) Did the transaction close? (Refer to Appendix I to **Part Ten**, Arbitrable Issues)
 - (d) Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to **Part Ten**, Arbitrable Issues)

Nature, status, and terms of buyer representation agreements

- (1) What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in, e.g., agent, legally-recognized non-agent, other?
- (2) Was the buyer representation agreement(s) in writing? Is it enforceable?
- (3) What were the terms of compensation established in the buyer representation agreement(s)?
- (4) Was the buyer representative(s) a broker or firm to which an offer of compensation was made by the listing broker?
- (5) Was the buyer representative(s) actions in accordance with the terms and conditions of the buyer representation agreement(s)?
- (6) At what point in the buying process was the buyer representation relationship established? (*Revised 5/03*)

Nature, status, and terms of the offer to compensate

- (1) Was an offer of cooperation and compensation made in writing? If not, how was it communicated?
- (2) Is the claimant a party to whom the listing broker's offer of compensation was extended?
- (3) Were the broker's actions in accordance with the terms and conditions of the offer of cooperation and compensation (if any)? Were all conditions of the agreement met?

Roles and relationships of the parties

- (1) Who was the listing broker?
- (2) Who was the cooperating broker or brokers?
- (3) Were any of the brokers acting as subagents? As buyer brokers? In another legally recognized capacity?
- (4) Did the cooperating broker(s) have an agreement, written or otherwise, to act as agent or in another legally recognized capacity on behalf of any of the parties?
- (5) Were any of the brokers (including the listing broker) acting as a principal in the transaction?
- (6) What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?
 - (a) Was the buyer represented by a party with whom the broker had previously dealt?
 - (b) Is the primary shareholder of the buyer-corporation a party with whom the broker had previously dealt?
 - (c) Was a prior prospect a vital link to the buyer?
- (7) Are all appropriate parties to the matter joined?

(*Revised 5/03*)

Initial contact with the purchaser

- (1) Who first introduced the purchaser or tenant to the property?
- (2) When was the first introduction made?
 - (a) Was the introduction made when the buyer had a specific need for that type of property?
 - (b) Was the introduction instrumental in creating the desire to purchase?
 - (c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - (d) Were there previous dealings between the buyer and the seller?
 - (e) Did the buyer find the property on his own?
- (3) How was the first introduction made?
 - (a) Was the property introduced as an open house?
 - (b) What subsequent efforts were made by the broker after the open house? (Refer to Factor #1)
 - (c) Was the introduction made to a different representative of the buyer?
 - (d) Was the “introduction” merely a mention that the property was listed?
 - (e) What property was first introduced?

Conduct of the brokers

- (1) Were all required disclosures complied with?
- (2) Was there a faithful exercise of the duties a broker owes to his client/principal?
- (3) If more than one cooperating broker was involved, was either (or both) aware of the other’s role in the transaction?
- (4) Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (Refer to Factor #4)
- (5) Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker’s efforts, which led to the successful transaction — that is, did the broker perform services which assisted the buyer in making his decision to purchase? (Refer to Factor #4)
 - (a) Did the broker make preparations to show the property to the buyer?
 - (b) Did the broker make continued efforts after showing the property?
 - (c) Did the broker remove an impediment to the sale?
 - (d) Did the broker make a proposal upon which the final transaction was based?
 - (e) Did the broker motivate the buyer to purchase?
- (6) How do the efforts of one broker compare to the efforts of another?
 - (a) What was the relative amount of effort by one broker compared to another?
 - (b) What was the relative success or failure of negotiations conducted by one broker compared to the other?
- (7) If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment and estrangement)

- (1) What was the length of time between the broker’s efforts and the final sales agreement?
- (2) Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?
 - (a) Did the buyer terminate the relationship with the broker? Why? (Refer to Factor #4)
 - (b) Did negotiations break down?
- (3) If there was an interruption or break in the original series of events, how was it caused, and by whom?
 - (a) Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?
 - (b) Did the purchaser’s motive for purchasing change?
 - (c) Was there interference in the series of events from any outside or intervening cause or party?
- (4) Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker’s inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?
- (5) Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

Conduct of the buyer

- (1) Did the buyer make the decision to buy independent of the broker’s efforts/information?
- (2) Did the buyer negotiate without any aid from the broker?
- (3) Did the buyer seek to freeze out the broker?
 - (a) Did the buyer seek another broker in order to get a lower price?
 - (b) Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
 - (c) Did the contract provide that no brokers or certain brokers had been involved?

Conduct of the seller

- (1) Did the seller act in bad faith to deprive the broker of his commission?
 - (a) Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker’s commission?
 - (b) Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?
 - (c) Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?
- (2) Was there bad faith evident from the fact that the seller told the broker he would not sell on certain terms, but did so via another broker or via the buyer directly?

Leasing transactions

- (1) Did the cooperating broker have a tenant representation agreement?
- (2) Was the cooperating broker working with the “authorized” staff member of the tenant company?
- (3) Did the cooperating broker prepare a tenant needs analysis?
- (4) Did the cooperating broker prepare a market analysis of available properties?
- (5) Did the cooperating broker prepare a tour book showing alternative properties and conduct a tour?
- (6) Did the cooperating broker show the tenant the property leased?
- (7) Did the cooperating broker issue a request for proposal on behalf of the tenant for the property leased?
- (8) Did the cooperating broker take an active part in the lease negotiations?
- (9) Did the cooperating broker obtain the tenant’s signature on the lease document?
- (10) Did the tenant work with more than one broker; and if so, why? (*Revised 11/96*)

Other information

Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

These questions are typical, but not all-inclusive, of the questions that may assist Hearing Panels in understanding the issues before them. The objective of a panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.

Sample Fact Situation Analysis

The National Association’s Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the arbitrators’ award. Among the reasons for this are the fact that arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute; that the issues considered by Hearing Panels are often myriad and complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and that the inclusion of written findings of fact or rationale (or both) would conceivably result in attempts to use such detail as “precedent” in subsequent hearings which might or might not involve similar facts. The end result might be elimination of the careful consideration of the entire course of events and conduct contemplated by these procedures and establishment of local, differing arbitration “templates” or predeterminants of entitlement inconsistent with these procedures and Interpretation 31.

Weighed against these concerns, however, was the desire to provide some model or sample applications of the factors, questions, and issues set forth in these Arbitration Guidelines.

The following “fact situations” and analyses are provided for informational purposes and are not intended to carry precedential weight in any hearing.

Fact Situation #1

Listing Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Broker L with a signed purchase agreement, which was accepted by the seller. Subsequently, Broker Z requested arbitration with Broker L, claiming to be the procuring cause of sale.

Analysis: While Broker Z may have been the procuring cause of sale, Broker L’s offer of compensation was made only to members of the MLS. Broker L never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Situation #2

Same as #1, except Broker Z is the buyer’s agent.

Analysis: Same result, since there was no contractual relationship between Broker L and Broker Z and no issue to arbitrate.

Fact Situation #3

Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A (a subagent) wrote an offer to purchase on behalf of Buyer #1 which was presented to the seller by Broker L and which was accepted. At closing, subagency compensation is paid to Broker A. Broker S subsequently filed an arbitration request against Broker A, claiming to be the procuring cause of sale.

Analysis: Broker S’s claim could have been brought against Broker A (pursuant to Standard of Practice 17-4) or against Broker L (the listing broker), who had promised to compensate the procuring cause of sale, thus arguably creating a contractual relationship between Broker L and Broker S. (*Amended 11/96*)

Fact Situation #4

Same as #3, except Broker S filed the arbitration request against Broker L (the listing broker).

Analysis: This is an arbitrable matter, since Broker L promised to compensate the procuring cause of sale. Broker L, to avoid the possibility of having to pay two cooperating brokers in the same transaction, should join Broker A in arbitration so that all competing claims can be resolved in a single hearing. The Hearing Panel will consider, among other things, why Buyer #1 made the offer to purchase through Broker A instead of Broker S. If it is determined that Broker S initiated a series of events which

were unbroken in their continuity and which resulted in the sale, Broker S will likely prevail.

Fact Situation #5

Same as #3, except Broker L offered compensation only to subagents. Broker B (a buyer agent) requested permission to show the property to Buyer #1, wrote an offer which was accepted, and subsequently claimed to be the procuring cause of sale.

Analysis: Since Broker L did not make an offer of compensation to buyer brokers, there was no contractual relationship between Broker L and Broker B and no arbitrable issue to resolve.

If, on the other hand, Broker L had offered compensation to buyer brokers either through MLS or otherwise and had paid Broker A, then arbitration could have been conducted between Broker B and Broker A pursuant to Standard of Practice 17-4. Alternatively, arbitration could occur between Broker B and Broker L.

Fact Situation #6

Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1, who appeared uninterested. Broker S made no effort to further contact Buyer #1. Six weeks later, Broker B (a buyer broker) wrote an offer on the property on behalf of Buyer #1, presented it to Broker L, and it was accepted. Broker S subsequently filed for arbitration against Broker L, claiming to be the procuring cause. Broker L joined Broker B in the request so that all competing claims could be resolved in one hearing.

Analysis: The Hearing Panel will consider Broker S's initial introduction of the buyer to the property, the period of time between Broker S's last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S's last contact with the buyer, the fact that Broker S had made no subsequent effort to contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the Hearing Panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

Same as #6, except that Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer broker). At the arbitration hearing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that "I needed a buyer agent to be sure that I got the best deal."

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S's efforts were primarily responsible for

bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (*Amended 11/99*)

Fact Situation #8

Similar to #6, except Buyer #1 asked Broker S for a comparative market analysis as the basis for making a purchase offer. Broker S reminded Buyer #1 that he (Broker S) had clearly disclosed his status as subagent, and that he could not counsel Buyer #1 as to the property's market value. Broker B based his claim to entitlement on the grounds that he had provided Buyer #1 with information that Broker S could not or would not provide.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had made early and timely disclosure of his status as a subagent; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's inability to provide a comparative market analysis of the property had clearly broken the chain of events leading to the sale. If the panel determines that the buyer did not have cause to leave Broker S for Broker B, they may conclude that the series of events initiated by Broker S remained unbroken, and Broker S will likely prevail.

Fact Situation #9

Similar to #6, except Broker S made no disclosure of his status as subagent (or its implications) until faced with Buyer #1's request for a comparative market analysis.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's belated disclosure of his agency status (and its implications) clearly broke the chain of events leading to the sale. If the panel determines that Broker S's failure to disclose his agency status was a reasonable basis for Buyer #1's decision to engage the services of Broker B, they may conclude that the series of events initiated by Broker S had been broken, and Broker B will likely prevail.

Fact Situation #10

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A, acting as a subagent, showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B, also acting as a subagent but independent of Broker A, showed the same property to the chairman of ABC Corporation, whom he had known for more than fifteen (15) years. The chairman liked the property and instructed Broker B to draft and present a lease on behalf of ABC Corporation to Broker L, which was accepted by the

owner/landlord. Subsequent to the commencement of the lease, Broker A requested arbitration with Broker L, claiming to be the procuring cause.

Analysis: This is an arbitrable matter as Broker L offered compensation to the procuring cause of the sale or lease. To avoid the possibility of having to pay two commissions, Broker L joined Broker B in arbitration so that all competing claims could be resolved in a single hearing. The Hearing Panel considered both brokers' introductions of the property to ABC Corporation. Should the Hearing Panel conclude that both brokers were acting independently and through separate series of events, the Hearing Panel may conclude that Broker B was directly responsible for the lease and should be entitled to the cooperating broker's portion of the commission. (*Adopted 11/96*)

Fact Situation #11

Broker A, acting as the agent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering compensation to both subagents and buyer/tenant agents. Over a period of several months, Broker A made the availability of the property known to XYZ Company and, on three (3) separate occasions, showed the property to various operational staff of XYZ Company. After the third showing, the vice president of finance asked Broker A to draft a lease for his review with the president of XYZ Company and its in-house counsel. The president, upon learning that Broker A was the listing agent for the property, instructed the vice president of finance to secure a tenant representative to ensure that XYZ Company was getting "the best deal." One week later, tenant representative Broker T presented Broker A with the same lease that Broker A had previously drafted and the president of XYZ Company had signed. The lease was accepted by the out-of-state corporation. Upon payment of the lease commission to Broker A, Broker A denied compensation to Broker T and Broker T immediately requested arbitration claiming to be the procuring cause.

Analysis: The Hearing Panel should consider Broker A's initial introduction of XYZ Company to the property, Broker A's contact with XYZ Company on an on-going basis, and whether Broker A initiated the series of events which led to the successful lease. Given the above facts, Broker A will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #12

Broker A has had a long-standing relationship with Client B, the real estate manager of a large, diversified company. Broker A has acquired or disposed of twelve (12) properties for Client B over a five (5) year period. Client B asks Broker A to locate a large warehouse property to consolidate inventories from three local plants. Broker A conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Client B, and identifies four (4) possible properties that seem to meet most of Client B's needs. At Client B's request, he arranges and conducts inspections of each of

these properties with several operations level individuals. Two (2) of the properties were listed for sale exclusively by Broker C. After the inspections, Broker A sends Broker C a written registration letter in which he identifies Client B's company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Broker C responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Broker A on either of the properties. Six (6) weeks after the inspections, Client B selects one of the properties and instructs Broker A to initiate negotiations with Broker C. After several weeks the negotiations reach an impasse. Two (2) weeks later, Broker A learns that Broker C has presented a proposal directly to Client B for the other property that was previously inspected. Broker A then contacts Broker C, and demands to be included in the negotiations. Broker C refuses, telling Broker A that he has "lost control of his prospect," and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property. Broker A files a request for arbitration against Broker C.

Analysis: This would be an arbitrable dispute as a compensation agreement existed between Broker A and Broker C. The Hearing Panel will consider Broker A's introduction of the property to Client B, the property reports prepared by Broker A, and the time between the impasse in negotiations on the first property and the sale of the second property. If the Hearing Panel determines that Broker A initiated the series of events that led to the successful sale, Broker A will likely prevail. (*Adopted 11/96*)

Appendix VI to Part Ten

Mediation as a Service of Member Boards

Although no party to an arbitrable matter can be required to submit to mediation (unless REALTORS® [principals] are required by their Board to mediate otherwise arbitrable disputes pursuant to Article 17) and mediation cannot and is not intended to be a substitute for the arbitration procedures described elsewhere in this Manual, mediation can be a useful tool in resolving the conflicts that arise involving Board Members and their clients and customers. Mediation must be available in instances where arbitration would be provided under **Part Ten**, Section 44 of this Manual and a Board can require REALTORS® (principals) to mediate otherwise arbitrable disputes pursuant to Article 17. Mediation can resolve disputes, promote amicable resolutions, and reduce the number of cases requiring the more formal and complex arbitration procedures of the Board, thus reducing the time and effort required of Board Members serving on the Professional Standards Committee. *(Revised 11/11)*

Selection of Board Mediation Officer:

Conducting successful mediation procedures requires tact, diplomacy, and a sense of equity. Careful consideration should be given by the Board President (or the Board of Directors of the Board) in selecting the Board's Mediation Officer. Many Boards will find that one Mediation Officer will be sufficient. However, in large Boards, consideration can be given to appointing a standing panel of two, three, or more Mediation Officers depending upon the number of requests for arbitration normally filed in the course of a year.

A Board Mediation Officer should be appointed for a term of at least one (1) year. Consideration can be given by the local Board to making the appointment for two (2) or even three (3) years. It is strongly recommended that any individual serving as a Board Mediation Officer have extensive prior experience on the Board's Grievance Committee, Professional Standards Committee, and/or Board of Directors. The Mediation Officer should be thoroughly conversant with the Board's arbitration procedures as well as with the real estate rules and regulations of the state. It is recommended that the Mediation Officer not serve concurrently as either an officer or director of the Board, or as a member of the Grievance Committee, or as a member of the Professional Standards Committee. If Mediation Officers are members of the Grievance Committee, they shall not participate in the consideration of requests for arbitration or ethics complaints arising out of the same facts and circumstances giving rise to a matter they attempted to mediate. If Mediation Officers are members of the Professional Standards Committee, they shall not serve on an arbitration Hearing Panel in cases where they had initially attempted to resolve the dispute prior to an arbitration hearing, or on an ethics Hearing Panel in cases where an ethics complaint arises out of the same facts and circumstances giving rise to a matter they attempted to mediate. The Mediation Officer should be someone widely respected for fairness, experience, and impartiality. Only to the degree that all parties to the mediation can be confident that the mediator is impartial will mediation procedures be successful. By having

more than one Mediation Officer, assignments can be made to utilize a particular individual whose experience, abilities, and relationship renders him/her most appropriate for the particular assignment. *(Revised 11/91)*

Mediation is Mandatory or Voluntary as Determined by the Board:

It must be understood by all parties that participation in mediation procedures is entirely voluntary unless REALTORS® (principals) are required by their Board to mediate otherwise arbitrable disputes pursuant to Article 17. If the Board or Association does not require REALTORS® (principals) to mediate otherwise arbitrable matters, the parties should be offered the opportunity and encouraged to participate in the mediation process in good faith, and, further, encouraged to abide by the determination. The parties to mediation should be aware that they may withdraw from the process at any point prior to reaching an agreement. Any offers of settlement that were not accepted or any suggested resolution proposed by the Mediation Officer that was not accepted will not be introduced as evidence nor considered in any manner should the matter require arbitration by the Board's Professional Standards Committee. However, if the parties agree to a settlement of the dispute, and the settlement has been reduced to writing and has been signed by all of the parties, the matter is deemed resolved and cannot be the subject of a subsequent arbitration hearing. In the event either of the parties later fails to abide by the terms of the settlement, the matter may not be arbitrated; instead, the other party should be encouraged to have the settlement agreement judicially enforced by a court of competent jurisdiction. (A sample settlement agreement is included as Form #A-17, in **Part Thirteen** of this Manual.) *(Revised 5/12)*

Need for Adequate Notice:

In mediation the need for due process remains. Generally, there will be no need for the parties to be represented by legal counsel nor for the Board to have legal counsel present at a mediation proceeding. However, since mediation is an attempt to bring the disputing parties together in an informal setting to resolve their differences, every effort should be made to ensure that the parties are provided with adequate prior notice (at least ten [10] days) and that the time and location of the proceeding is mutually convenient to all involved. However, this requirement shall not preclude parties to a dispute waiving such notice and agreeing to mediate at any time agreed by all parties. *(Revised 5/12)*

Initiation of Mediation Proceedings:

The Professional Standards Administrator, upon receipt of a request for arbitration, will advise all parties of their mediation obligations and options to participate in mediation prior to review of the arbitration request by the Grievance Committee. If mediation is voluntary and the parties agree, the matter will be referred to the Mediation Officer, who will arrange a mutually convenient time and location for mediation. When mediation

is voluntary and the mediation attempt is unsuccessful, or if either of the parties wishes to discontinue the mediation process for any reason, then mediation will be terminated and the request for arbitration will be referred to the Grievance Committee for review. Regardless of whether mediation is voluntary or mandatory, if either party requests that mediation be deferred until after the arbitration request can be reviewed by the Grievance Committee, the arbitration request will be referred to the Grievance Committee for that committee's determination whether (a) an arbitrable issue exists, and (b) whether arbitration would be voluntary or mandatory. Where any party initially declines to mediate pending the Grievance Committee's review of the arbitration request, the parties shall in all instances again be offered the opportunity to mediate following the Grievance Committee's review. *(Revised 5/12)*

Boards may also offer disputing parties an opportunity to mediate prior to an arbitration request being filed. *(Adopted 11/11)*

NOTE: If a Board requires REALTORS® (principals) to mediate otherwise arbitrable disputes, there can be no allegation of a violation of Article 17 if a party refuses to mediate unless an arbitration request has been filed, the Grievance Committee has referred the arbitration request for hearing on a mandatory basis, and the party then refuses to mediate. *(Adopted 11/11)*

Conduct of Mediation Procedures:

If, for any reason, any of the parties (or the Mediation Officer) is unable to participate on the date agreed, the procedure should be rescheduled to the earliest mutually acceptable date. Witnesses, if any, should be kept to a minimum. *(Revised 11/03)*

Realizing that a dispute already exists between the parties, the Mediation Officer should make every effort to encourage a conciliatory atmosphere while ensuring a full discussion of all pertinent facts. The complainant and respondent should be encouraged to appreciate each other's position in the matter and to effect a solution that will eliminate the need for arbitration by the Board's Professional Standards Committee. The parties can agree to a mutual resolution of the matter at any time during the mediation procedure. If, following a thorough discussion of all the pertinent facts, the parties are still unable to resolve the matter, the Mediation Officer may, at the Mediation Officer's discretion, then make a recommendation. Any recommendation for resolution can be oral or in writing and will be provided to both parties at the conclusion of the mediation procedure. The parties can agree to the Mediation Officer's proposed resolution at that time. If neither of the parties desires to give additional consideration to the Mediation Officer's resolution, both parties will be given a specified period of time, not to exceed forty-eight (48) hours, to consider the resolution and to advise the Mediation Officer of their acceptance or rejection of it. If either of the parties rejects the proposed resolution, the mediation procedure will be deemed concluded and the matter will proceed to arbitration. Any party who does not respond to the Mediation Officer within seventy-two (72) hours will be deemed to have rejected the suggested solution and arbitration will proceed. *(Revised 11/96)*

NOTE: When the Board adopts the mediation procedures described in this Manual or develops similar procedures, they should be included in the Board's *Code of Ethics and Arbitration Manual* in whole or by reference. *(Revised 11/96)*